No. 97-1692

(2)

Supreme Court, U.S.
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In The
Supreme Court of the United States

October Term 1997

STEPHEN E. DARLING;
RHONDA RENE DARLING,
Petitioners,

v.

SAVERS LIFE INSURANCE COMPANY,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Did the Court of Appeals correctly affirm the District Court's grant of Summary Judgment where the Petitioners materially misrepresented their medical histories on an insurance application in breach of the insurance contract and in violation of S.C. Code Ann. § 38-71-40?

LIST OF PARENT COMPANIES AND NON-WHOLLY OWNED SUBSIDIARIES

The following is the parent company of the Respondent, Savers Life Insurance Company: Standard Management Corporation. There are no non-wholly owned subsidiaries.

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JURISDICTION

Jurisdiction of the Federal Court was based on diversity of the Parties pursuant to 28 U.S.C. 1332. Jurisdiction of this Court is invoked pursuant to 28 U.S.C. 1254(1).

STATEMENT OF THE CASE

On or about September 24, 1993, Michael O. Benke, an independent insurance agent, at the request of Stephen Darling's mother, met with Stephen Darling at his place of employment to discuss health insurance for the Petitioners, Stephen and Rhonda Darling ("the Darlings"). Benke operated an insurance agency known as Business Management Consultants and was a sub-agent of American Health Underwriters (formerly Savers Health Underwriters). American Health Underwriters is not corporately related to Respondent, Savers Life Insurance Company ("Savers Life"). In accordance with South Carolina law, Benke was licensed to submit applications for insurance to Savers Life through American Health Underwriters. Benke was also authorized to submit applications for insurance for up to twenty-five other different companies. He was not an employee of Savers Life. He acted for and on behalf of the Darlings and as legal agent for the Darlings in submitting an application for insurance to Savers Life.[1]

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[1] The Court of Appeals noted: "The District Court did not decide whether the insurance salesman, Benke, served as the legal agent of the Darlings or of Savers Life, although the Court noted that, under the applicable legal standard,

During Benke's meeting with Stephen Darling, Benke completed the Application for insurance and reviewed the Savers Life coverage. Mrs. Darling was not present during the completion of the Application; however, she was contacted by telephone on three separate occasions to obtain information for the Application. Stephen Darling signed the Application for himself. Stephen Darling's mother, Erica Darling, signed the Application on behalf of Rhonda Darling after obtaining authorization from Rhonda Darling to do so. The application contained the following language:

> I hereby apply to Savers Life Insurance Company for a Certificate to be issued solely and entirely in reliance on the written answers to the questions on this Application ... I understand and agree that the falsity of any answer or statement in this Application may bar the right to recover thereunder if such answer materially affects the acceptance of the risk or hazard assumed by the

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Benke appeared to be the legal agent of the Darlings... It was not necessary to resolve this agency question because even if Mr. Benke was acting as an agent of Savers Life, the fact would not obviate the Darlings' responsibility for any misrepresentations in the application. *See Parnell v. United Insurance Co.*, 142 S.E.2d 204 (S.C. 1965) (allowing insurer to rescind the policy based on material misstatements in the plaintiff's application, even though the plaintiff alleged that the insurance company's agent had inserted false answers in her application without her knowledge and that she had signed the application without reading it)."

> Company. The Company may rely upon this Application and all the information contained herein....

On or about October 2, 1993, Norma Long, a Savers Life employee, conducted a telephone interview with Rhonda Darling to follow up on the information contained in the Application. Savers Life also obtained medical records for the physicians identified by the Darlings on the Application as their treating physicians. Based upon the information provided in the Application, during the telephone interview with Rhonda Darling and from the medical records received, Savers Life issued a Certificate of Insurance to the Darlings, effective October 8, 1993. The Application was attached to, and made a part of, the Certificate. The Certificate states:

> Please read the copy of the Application attached to this Certificate. Carefully check the Application to be sure all information is correct. If you find errors or if any past medical history has been left out of the application, contact us at 8064 North Point Boulevard, Winston-Salem, NC 27106, immediately. This Application is part of the Certificate, and the Certificate was issued on the basis that the answers to all questions and the information shown in the Application were correct and complete.

The Darlings did not report any inaccuracies in the information on the Application.

Within the period of contestability, and in conjunction with subsequent claims submitted to Savers Life by the Darlings' medical providers, Savers Life obtained certain historical medical records for the Darlings from physicians not previously identified on the Application. Savers Life discovered that the information in those medical records differed from that provided by the Darlings in their Application and during the telephone interview, and determined that the Darlings would not have qualified for coverage if they had provided accurate, complete medical histories to Savers Life. Relying on the contractual language of the Application that allowed Savers Life to void the policy for material misrepresentations by the Insureds and relying on South Carolina Code Ann. § 38-71-40[2], Savers Life refunded the Darlings' premium and declared the Certificate void *ab initio*.

Savers Life rescinded its contract with the Darlings based upon their failure to disclose a number of material health problems including: Mr. Darling's bulging cervical disk, recent back injury and treatment for a past neck injury and Mrs. Darling's history of chest pain, treatment for

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[2] South Carolina Code Ann. § 38-71-40 provides: "The falsity of any statement in the application for any policy covered by this chapter does not bar the right to recovery thereunder unless the false statement was made with actual intent to deceive or unless it materially affected either the acceptance of the risk or the hazard assumed by the insurer."

dyspnea, treatment for anxiety, prior dizziness, blurred vision and migraine headaches.[3]

Thomas E. Gullett, Director of Major Medical and Chief Underwriter for Savers Life, testified that these misrepresentations were material to Savers Life's assumption of the risk of insuring the Darlings. Likewise, Gordon Rose, the Darlings' own expert, testified that certain of these non-disclosures were material to the risk undertaken by Savers Life.

SUMMARY OF THE ARGUMENT

The Darlings' materially misrepresented their medical histories in their application to Savers Life. Such misrepresentations were material to the risk accepted by Savers Life. Under the contractual language of the Savers Life Application and Certificate, and under South Carolina Code Ann. § 38-71-40, Savers Life was entitled to rescind its contract with the Darlings.

A Writ of Certiorari will be granted only for compelling reasons. Petitioners have advanced no reason of the character considered by this Court in exercising its discretion pursuant to Rule 10 of the Rules of the Supreme Court of the United States.

Savers Life was entitled to judgment as a matter of law. Thus, the Petition for Writ of Certiorari should be denied.

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[3] Savers Life also considered other non-disclosed health problems; however, the Fourth Circuit Court of Appeals determined there may be issues of fact regarding Mrs. Darling's thyroid treatment, ovarian cysts and rectal bleeding. Petitioners' App. at 11 – 12.

ARGUMENT

I. SAVERS LIFE WAS ENTITLED, UNDER BOTH SOUTH CAROLINA CODE ANN. § 38-71-40 AND CONTRACTUAL LANGUAGE, TO RESCIND ITS CONTRACT WITH THE DARLINGS AND TO JUDGMENT AS A MATTER OF LAW.

The Darlings' material misrepresentations regarding their medical histories were sufficient grounds for Savers Life to rescind its contract with the Darlings under South Carolina Code Ann. § 38-71-40. The Code provides:

> The falsity of any statement in the application for any policy covered by this chapter does not bar the right to recovery thereunder unless the false statement was made with actual intent to deceive or unless it materially affected either the acceptance of the risk or the hazard assumed by the Insurer.

South Carolina Code Ann. § 38-71-40. In addition, the Darlings' insurance Application states that they "agree that the falsity of any answer or statement in this Application may bar the right to recover thereunder if such answer materially affects the acceptance of the risk or hazard assumed by the Company."

Savers Life issued a Certificate of Insurance to the Darlings, effective October 8, 1993. The

Application was attached to, and made part of, the Certificate. The Certificate states:

> Please read the copy of the Application attached to this Certificate. Carefully check the Application to be sure all information is correct. If you find errors or if any past medical history has been left out of the Application, contact us at 8064 North Point Boulevard, Winston-Salem, North Carolina 27106 immediately. This Application is part of the Certificate, and this Certificate was issued on the basis that the answers to all questions and the information shown on the Application was correct and complete.

Where the Darlings breached their common law and contractual duties, Savers Life justifiably rescinded the Darlings' policy.

The District Court found numerous inaccuracies in the information the Darlings provided Savers Life. The Court of Appeals disagreed with the District Court's implicit finding that there were no disputed factual issues about all of the alleged misrepresentations. Petitioners' App. at 11. However, the Court of Appeals found that there were no genuine disputes as to the Darlings' material misrepresentations about Mr. Darling's bulging cervical disk, Mrs. Darling's history of chest pain, and Mrs. Darling's treatment of dyspnea. Petitioners' App. at 12. The Court of Appeals determined such

misrepresentations sufficient for Savers Life to rescind its contract. Petitioners' App. at 12. These misrepresentations were sufficient because they were undisputed, undisclosed and clearly material to Savers Life's assumption of the risk of insuring the Darlings.

Petitioners suggest that Savers Life's rescission of the policy is really two distinct cases. Petitioners' Brief at 8-9. According to the Petitioners, Mr. Darling's misrepresentations were irrelevant as to whether Mrs. Darling was entitled to continuing coverage from Savers Life. Petitioners' Brief at 8. They support this argument by asking generally if, under Savers Life's underwriting requirements, Savers Life could disqualify one family member and insure the rest of the family. Mr. Gullett answered "yes." He added that "[Savers Life] could disqualify one spouse and insure another spouse." Petitioners argue that Rhonda and Stephen Darling's insurability was not contingent on each other based on Mr. Gullett's general statements. Petitioners' Brief at 8 – 9. However, the record clearly shows neither Mr. Darling nor Mrs. Darling would qualify individually. Additionally, the Court of Appeals found that the Darlings completed only <u>one</u> insurance Application, were issued only <u>one</u> insurance certificate, and entered into only <u>one</u> contract with Savers Life. Petitioners' App. at 9. (*emphasis added).* Furthermore, Mr. and Mrs. Darling were jointly, rather than separately, insured by Savers Life and their respective coverage under this one policy was derivative of each other's coverage. Petitioners' App. at 9 - 10. The Court of Appeals

concluded that it was "very unlikely that the South Carolina Supreme Court would hold that Mr. Darling's coverage was severable from Mrs. Darling's coverage and thus that Mr. Darling's misrepresentation would not void Mrs. Darling's coverage. Petitioners' App. at 11.

Petitioners have also argued that Mississippi law should be followed to prevent Mrs. Darling from being banned by any misrepresentations in the telephone interview because the telephone questionnaire was not attached to the policy. Petitioners' Brief at 9. Mississippi law has neither a binding effect, nor should it have a persuasive effect on the South Carolina Supreme Court, this Court or the outcome of this case. Moreover, Petitioners disingenuously argue that the existence of any factual dispute with regard to Mrs. Darling's medical history is sufficient to take this case before a jury. The District Court and the Court of Appeals found no genuine factual dispute existing as to the Darlings' material misrepresentations about Mr. Darling's bulging cervical disk, Mrs. Darling's history of chest pains and her treatment for dyspnea. Whatever factual disputes may remain regarding the Darlings' medical history are irrelevant because *any material misrepresentation* justified Savers Life's rescission of the policy according to the contractual agreement between the Darlings and Savers Life and South Carolina Code Ann. § 38-71-40. The Darlings' own expert, Gordon Rose, testified that "[i]f an applicant for health insurance present[ed] with a history nine months prior to the application of chest pain of undetermined cause,"

then "he would consider that history both 'material' and 'serious.'"[4] Petitioners' App. at 13. The Court of Appeals added that Mrs. Darling was obligated to disclose her prior medial treatment for dyspnea. Petitioners' App. at 14. There is no factual dispute that Mrs. Darling's failure to disclose her prior chest pain and dyspnea was a material misrepresentation and material to Savers Life's risk.

Where the Darling materially misrepresented their medical histories in their Application for Insurance, Savers Life was entitled, under both the South Carolina Code Ann. § 38-71-40 and contractual language, to rescind its contract with the Darlings. Thus, the Petition for Writ of Certiorari should be denied.

II. PETITIONERS MISREPRESENT CERTAIN FACTS IN THEIR BRIEF.

This Court should consider facts only from the record and not facts either mischaracterized or not a part of the record.

Petitioners have characterized the insurance salesman, Mr. Benke, who met with Stephen Darling regarding the application for major medical health insurance, as a "Savers Life Agent." Petitioners' Brief at 2. Neither the District Court nor the Court of Appeals decided whether Mr. Benke served as legal agent of the Darlings or Savers Life. Petitioners' App. at 6, n. 3. However, both courts affirmed that it

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[4] Mrs. Darling had a history of chest pains for nineteen months, rather than nine months, before the Application date.

appeared that Mr. Benke was the legal agent of the Darlings. Petitioners' App. at 6, n. 3. Furthermore, both courts concluded that it was not necessary to resolve this agency question because, even if Mr. Benke acted as an agent of Savers Life, this fact would not obviate the Darlings' responsibility for any misrepresentations in the Application. Petitioners' App. at 6, n. 3; *See Parnell v. United Insurance Company, 142 S.E.2d 204 (S.C. 1965).*

Petitioners also stated that Mr. Benke completed this Application in a "hasty, cursory manner" and that Mr. Benke did not stress that the Application was very important. Petitioners' Brief at 2. There is no evidence to support this claim in the record. Petitioners have asserted that "[u]nderwriting at the time claims are made has become a disturbing trend in the health insurance industry." Petitioners' Brief at 2. Such contention is argumentative and unsupported by the record. To the contrary, Savers Life completed underwriting before the policy was issued based upon information provided. Finally, Petitioners have asserted that they have almost $100,000.00 in medical bills that Savers Life has refused to pay, they have characterized their current financial position and emotional standing as ruined, they claim that they have been refused medical treatment and can not obtain health insurance, and that this situation has caused the end of their marriage and has caused them to compromise their children's health due to a lack of money and no health insurance. Petitioners' Brief at 3 – 4. There is no evidence in the record to support such outrageous and inflammatory

contentions. In fact, the Darlings' children (if any exist) were never insured under this Policy.

Where Petitioners have mischaracterized facts and can not support from the record a number of factual assertions contained in their Brief, including, but not limited to, the above examples, this Court should not consider these contentions in determining this matter before the Court.

III. UNDER THIS COURT'S JUDICIAL DISCRETION, THIS WRIT OF CERTIORARI SHOULD NOT BE GRANTED BECAUSE THERE IS NO COMPELLING REASON TO DO SO.

The District Court and the Court of Appeals based their respective decisions upon the record, South Carolina Ann. § 38-71-40, contractual language between the Darlings and Savers Life, and Fourth Circuit and South Carolina case law.

Petitioners argue that the Court of Appeals relied incorrectly on Atlantic Life Insurance Co. v. Hoefer, 66 F.2d 464, 466 (4th Cir. 1933) in determining the materiality of information given on the Application. Petitioners' Brief at 5. Atlantic held that a "representation is material when reasonably careful and intelligent men would regard the fact involved as substantially increasing the chances of the loss insured against; and that this is especially true when the insurer, on becoming aware of the fact, would raise the rates or reject the risk altogether." Id.; Petitioners' App. at 8. According to the

Petitioners, the standard by which materiality is determined should be "based on the insurance industry in general and what action a reasonable underwriter would have taken under the circumstances" as stated in Berber v. Minnesota Mutual Life Ins. Co., 38 Utah Adv. Rep 10, 723 P.2d 388 (1986). Petitioners' Brief at 5. The Court of Appeals properly looked to Atlantic Life Insurance and to Southern Farm Bureau Casualty Ins. Co. v. Ausburn, 155 S.E.2d 902, 908 (S.C. 1967) to determine the standard of materiality under South Carolina law. Petitioners' App. at 8. Southern Farm Bureau held that "a representation is material when the insured knows or has reason to believe that it will likely affect the decision of the insurance company as to the making of the contract of insurance or as to its terms." Southern Farm Bureau, 155 S.E.2d at 908. It is incredulous to assert that the State Court of last resort in South Carolina would consider or would use a standard for materiality from the law of the State of Utah in lieu of its own standard previously stated. Nonetheless, Petitioners own expert (presumably a reasonable underwriter) concedes the materiality of the non-disclosures addressed by the Court of Appeals.

Petitioners also cite King v. Ohio Valley Fire and Marine Insurance Company, 212 KY 770, 280 SW 127 (1926). Petitioners' Brief at 6. Once again, Kentucky case law has neither a binding effect nor should have a persuasive effect on the matter before this Court. Petitioners have gone so far as to assert that "case law (limited to King) does not favor the absolute reliance on the insurance carrier's employee to provide testimony

as to the materiality of the risk." Petitioners' Brief at 6.

Petitioners have also argued that the practice Savers Life used for underwriting caused an unreasonable delay and adversely affected the Petitioners, thus a jury question arises. Petitioners' Brief at 7. The Petitioners can cite no Fourth Circuit or South Carolina case to support this ludicrous contention. Petitioners' expert, Gordon Rose, testified generally that it is bad underwriting practice to underwrite at the time claims are made. However, there is no evidence that Savers Life underwrote the Darlings' claim at the time of their claim. The record is clear that Savers Life underwrote the Darlings' policy at the time the Certificate of Insurance was issued. The only thing that Savers Life did at the time subsequent claims were made was to review additional medical records from physicians not previously identified (and perhaps fraudulently hidden from Savers Life by the submission of an inaccurate Application).

This Court may grant or deny this Writ of Certiorari in its judicial discretion. Rule 10 of the Rules of the Supreme Court of the United States states that a "Petition for Writ of Certiorari will be granted only for compelling reasons." The matter before this Court does not present a "compelling reason." Petitioners have attempted to bolster their position by mischaracterizing facts, manufacturing contentions, hoping for sympathy, and creating an alleged underwriting conspiracy within the health insurance industry. The matter before the Court involves a contract between the Petitioners and Respondent to be interpreted

under South Carolina law. Petitioners can bring forth no conflicts from other United States Court of Appeals on the same matter. This matter involves neither an important federal question nor is it a federal question. Petitioners cite no unacceptable or unusual course of judicial proceedings in the courts below. Moreover, this was not a decision from the South Carolina Court of last resort regarding an important federal question. Lastly, the Court of Appeals did not decide an important question of federal law that has not been, but should be, settled by this Court. The matter is not of the character of reasons that this Court considers in granting a Writ of Certiorari.

Rule 10 further states that "[a] Petition for Writ of Certiorari is rarely granted when asserted errors consist of erroneous factual findings or a misapplication of a properly stated rule of law." Petitioners have set forth no erroneous factual findings and can only argue that judgment as a matter of law was improperly granted and affirmed in the courts below. This Court needs only to look to the material misrepresentations, contractual language between the Petitioners and the Respondents and the South Carolina Code Ann. § 38-71-40 to determine whether to grant or to deny this Writ of Certiorari. This Court should deny the Petition for Writ of Certiorari.

CONCLUSION

For the reasons stated above, the Petition should be denied.

Dated: May 12, 1998

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